



U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW – Suite 1100
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October 2, 2007

MEMORANDUM

TO: EAC Commissioners

CC: Tom Wilkey, Peggy Sims, Julie Hodgkins, Gavin Gilmour, Jeannie Layson, Tamar Nedzar

FROM: Edgardo Cortés, Election Research Specialist

SUBJECT: Staff Recommendation for an Interim Internal Procedure for Responding to State Requests to Change the Federal Form State Specific Instructions

The proposed policy provides internal EAC procedures for the processing of state requests to make changes to the Federal Voter Registration Form state specific instructions. This policy is distinct from EAC's rule making efforts initiated at the September 6, 2007 public meeting. At that meeting, the EAC Commissioners voted to begin a 30-day comment period regarding the Commission's intent to transfer the NVRA regulations from the FEC. Despite the fact that the EAC has not yet promulgated regulations necessary to assist in the development of the Federal form, it retains its obligation under the National Voter Registration Act to issue the Federal Form and respond to state requests.

In conjunction with the resolution passed on September 6, 2007 and the corresponding delays required by that action, Chair Donetta Davidson requested on September 20, 2007 that EAC staff develop an interim internal procedure for processing state requests to change the Federal form. This procedure is aimed at making transparent, uniform, and nondiscriminatory decisions on pending and subsequent requests to change the state-specific instructions of the National Mail Voter Registration Form, while the EAC works to take more formal action.

Until this time, EAC staff has made changes to the state instructions in the Federal Form without a Commission vote based on the policy carried over from the FEC's Office of Election Administration. Based on the Chair's September 20 request, EAC staff reviewed current operations and authority under NVRA, as well as the procedures the FEC implemented to review state requests. Due to the actions taken by the Commission to develop a more formal policy, procedure, and regulatory framework for handling state requests, staff believes that it would now be inappropriate for staff to act on or respond to state requests in the absence of a formal internal procedure for doing so. Accordingly, staff will not respond to state requests to amend the Federal Form without internal procedures adopted by the Commissioners.

Attached is the staff recommendation, *Interim Internal Procedure for Responding to State Requests to Change the Federal Form*, for processing state requests to change the federal form. The Commissioners should take immediate action to approve these internal procedures so that the review of state requests will be handled promptly, uniformly, transparently, and equitably.

Recommendation: EAC staff recommends that the Commissioners vote to immediately adopt the attached policy, *Interim Internal Procedure for Responding to State Requests to Change the Federal Form*, and publish the policy for notice in the Federal Register. Publication in the Federal Register will enable staff to respond to state requests in a transparent and uniform manner. In addition, publication will provide notice to the public about how the EAC deliberates and makes decisions regarding state requests.



Interim Internal Procedure for Responding To State Requests to Change the Federal Form

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Background. The National Voter Registration Act of 1993 (NVRA) requires the U.S. Election Assistance Commission (EAC) to develop a Federal Mail Voter Registration Application Form (42 U.S.C. §1973gg-7(a)(2)), which must be used and accepted by states “for the registration of voters in elections for Federal Office.” (42 U.S.C §1973gg-4(a)). The registration form developed by the EAC for use by the states must be consistent with the content requirements and limitations found in Section 9 of the NVRA (42 U.S.C. §1973gg-7(b)). The NVRA also grants the EAC authority to prescribe regulations that are needed to carry out its responsibilities with respect to the form. The EAC is presently considering the transfer of regulations promulgated by its predecessor agency, the Federal Election Commission, which it will then work to amend. Alternatively, the EAC will work to promulgate new regulations.

Purpose. As the EAC works to develop its regulatory frame work, it expects to receive requests from states to amend the Federal form’s state specific instructions. The EAC has the obligation and authority under NVRA to act on these requests, even if it has not yet promulgated regulations which would assist the agency in these efforts. The purpose of this policy is to provide the EAC with written temporary procedures regarding the processing of state requests for changes to the Federal Registration Form’s state specific instructions. Written procedures will ensure that all request are treated the same. Additionally, they will help the EAC expedite its process.

Roles and Responsibilities.

1. Director of Election Administration Support. The Director of Election Administration Support (formerly Programs and Services) shall be responsible for processing State requests for changes to the Federal Form. This includes reviewing, clarifying, classifying, and recommending action on each request. The Director shall implement any decisions made by the Executive Director or Commissioners.
2. Executive Director. The Executive Director will make decisions on requests which do not require a significant determination of policy or exercise of discretion.
3. General Counsel. The Office of the General Counsel shall provide counsel upon request to the Director of Election Administration Support, the Executive Director, or the Commissioners.
4. Commissioners. The Commissioners will make decisions on all requests which require a determination of policy or exercise of discretion. The Commissioners shall also respond to requests by a state for reconsideration or an opportunity to be heard after a decision has been made.

Procedure.

1. Request for Changes. All State requests submitted to the EAC for changes to the state specific instructions of the Federal Form shall be forwarded to the Director of Election Administration Support for processing.
2. Processing. The Division of Election Administration Support shall be responsible for processing state requests. The Division shall:
 - a. *Review*. Intake and review each request received by the agency. The Division shall acknowledge receipt of each request in writing and ensure that each request is timely processed.
 - b. *Clarification*. Request additional information from the requesting state. If upon review of the request, division staff identifies a need for additional information or clarification, staff shall coordinate with appropriate state officials. All requests for additional information shall be made in writing. Requests shall not be referred for action until all necessary information has been obtained.
 - c. *Classification*. Classify all requests into one of the following groups to facilitate the final decision-making process:
 - i. *State Voter Eligibility Requirements*. This group includes any request for change based upon a State's amendment to its constitutional or statutorily prescribed voter eligibility requirements. Voter eligibility requirements are standards which describe voter qualifications, not the procedures for demonstrating eligibility. Voter eligibility requirements traditionally include: voting age, citizenship, residence, mental capacity, criminal conviction, and oaths.
 - ii. *Administrative Matters*. This group includes any request for a change to a State's contact information or the proper state address for the submission of registration forms.
 - iii. *Procedural Matters*. This group includes any request for a change based upon a State's amendment to its statutes or administrative regulations regarding State or local registration procedures. Traditionally, changes to the form for such procedures have been limited by Federal Regulation (11 CFR §8.6) to information pertaining to type of primary (open or closed), voter identification numbers, declaration of race or ethnicity, and registration deadlines. Recently, states have requested EAC to address state specific procedures for other matters. As the EAC has not issued regulations identifying matters it will consider, it must address each request presented. Examples of these issues include state procedures for demonstrating citizenship, state voter identification requirements, and state requirements for organized voter registration programs.

- d. *Recommendation and Referral.* Make a recommendation, in writing, as to disposition and properly refer the request to the appropriate decision authority for action.
 - i. *State Voter Eligibility Requirements.* Requests classified as State Voter Eligibility Requirements shall be referred to the Executive Director for action. The Executive Director may request the Director of Election Administration Support to provide additional information or clarification as necessary.
 - ii. *Administrative Matters.* Requests classified as administrative matters shall be referred to the Executive Director for action. The Executive Director may request the Director of Election Administration Support to provide additional information or clarification as necessary.
 - iii. *Procedural Matters.* Requests classified as procedural matters shall be referred to the Commissioners for action. Copies of all relevant documents shall be provided to all Commissioners and the Executive Director. Each Commissioner may request the Director of Election Administration Support to provide additional information or clarification as needed. Any additional information requested by an individual Commissioner shall be provided by the Director of Election Administration Support to all Commissioners and the Executive Director.
3. *Decision Authority Review.* Upon receipt of the recommendation and referral, the decision authority shall review a State's request. The degree of discretion and standard of review will vary depending upon the classification of the request.
 - a. *State Voter Eligibility Requirement.* EAC discretion and action on state voter eligibility requirements is limited. The NVRA requires that the Federal Form specify each State's "eligibility requirements (including citizenship)." This is consistent with Article I, section 2 and the Seventeenth Amendment to the U.S. Constitution which grant States the authority to set requirements regarding voter qualifications. The Executive Director shall generally approve and implement State changes to voter eligibility requirements when the State has amended the relevant statute or constitutional provision. The Executive Director shall forward a request to amend the form to the Commissioners if he or she identifies a matter that requires the adoption of a policy or exercise of discretion.
 - b. *Administrative Matter.* The exercise of EAC discretion regarding administrative matters is generally unnecessary. Administrative matters are limited to changes in state contact information or the official address for the submission of registration forms. Generally, the Executive Director shall approve and implement relevant administrative changes. The Executive Director shall forward a request to amend the form to the Commissioners if he or she identifies a matter that requires the adoption of a policy or exercise of discretion.
 - c. *Procedural Matters.* Under the NVRA, the EAC has discretion in developing the Federal form which must be used and accepted by covered States. The accommodation of a state specific voter registration process in the Federal form is generally a matter of EAC

policy. However, this exercise of discretion is limited to the authority granted under the NVRA and any requirements or limitations regarding the form's content specified in the NVRA. This is consistent with Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, which grants the Federal government the authority to pass laws regulating the manner in which Federal elections are held. This authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. In exercising EAC's discretion, it is important that the Commissioners review requests in a uniform manner using consistent standards. The Commissioners shall vote to accommodate a state request for a change to the Federal instructions, unless:

- i. The request is inconsistent with the specific statutory requirements or prohibitions regarding the content of the Federal Form [42 U.S.C. §1973gg-7(b) and 42 U.S.C. §15483(b)(4)];
 - ii. The State procedure unduly complicates or significantly burdens voters in their efforts to register to vote in Federal elections using the Federal form in a manner inconsistent with the purposes of the NVRA; or
 - iii. The request is inconsistent with the Help America Vote Act, NVRA, or any other Federal Statute or Constitutional provision affecting voter registration for Federal elections.
4. Issuance of Decision. After review, the Decision Authority shall issue a determination on the request. Each decision shall be in writing.
- a. *Executive Director*. The Executive Director shall issue a written decision that clearly states a determination, any findings of the Executive Director, and identifies any documents or information that served as the basis of the decision.
 - b. *Commissioners*. The Commissioners shall issue a decision through a vote of the Commission. After a reasonable amount of time to review the materials, hold hearings as necessary, or collect additional information, the Chair of the Commission shall bring the State's request to a vote, consistent with the rules of the Commission. The measure presented for a vote shall take the form of a written Commissioners' decision. The written decision shall clearly state a determination, any findings of the Commissioners, and identify any documents or information that served as the basis of the decision. The Federal Form shall not be amended unless three or more commissioners vote for such amendment, consistent with Section 208 the Help America Vote Act (42 U.S.C. §15328).
5. Requests for Reconsideration. States may request to be heard or otherwise request reconsideration after an EAC decision. When such requests are sent to the EAC, they shall be forwarded to the Chair of the Commission. The Chair will acknowledge receipt of the request in writing. The acknowledgement shall also inform the State whether it shall be heard solely through the submission of written materials or whether a hearing will be set. The written acknowledgement will specify the dates of any hearing (if applicable) and notice

a reasonable deadline for the submission of written information. Any reconsideration of a request for a change to the Federal Form shall be made by a vote of the Commissioners, consistent with the procedure for the issuance a decision. Any decision on reconsideration shall be final and no subsequent requests for reconsideration on that particular matter will be considered.

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